

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KEVIN M. EVERSON,

Plaintiff,

5:23-cv-00707-TJM-TWD

v.

ONONDAGA COUNTY,

Defendant.

APPEARANCES:

KEVIN M. EVERSON

Plaintiff, *pro se*

23-B-2684

Franklin Correctional Facility

P.O. Box 10

Malone, NY 12953

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER AND REPORT-RECOMMENDATION

I. INTRODUCTION

The Clerk has sent to the Court for review a complaint submitted by *pro se* plaintiff Kevin M. Emerson (“Plaintiff”) alleging Onondaga County violated his civil rights. (Dkt. No. 1.) Plaintiff, who is currently in the custody of New York State Department of Corrections and Community Supervision (“DOCCS”) at the Franklin Correctional Facility in Malone, New

York,¹ has not paid the filing fee for this action and seeks leave to proceed *in forma pauperis* (“IFP application”).² (Dkt. Nos. 2, 7.)

II. IFP APPLICATION

“28 U.S.C. § 1915 permits an indigent litigant to commence an action in a federal court without prepayment of the filing fee that would ordinarily be charged.” *Cash v. Bernstein*, No. 09-CV-1922, 2010 WL 5185047, at *1 (S.D.N.Y. Oct. 26, 2010). “Although an indigent, incarcerated individual need not prepay the filing fee at the time of filing, he must subsequently pay the fee, to the extent he is able to do so, through periodic withdrawals from his inmate accounts.” *Id.* (citing 28 U.S.C. § 1915(b) and *Harris v. City of New York*, 607 F.3d 18, 21 (2d Cir. 2010)).

Upon review, Plaintiff’s IFP application demonstrates economic need. (Dkt. No. 2.) He also re-filed the inmate authorization form required in this District. (Dkt. No. 7.) Because Plaintiff has met the statutory requirements of 28 U.S.C. § 1915(a), and has filed the inmate authorization form required in this District, he is granted permission to proceed IFP. (Dkt. Nos. 2, 7.)

III. BACKGROUND

At the time of filing, Plaintiff was incarcerated at the Onondaga County Justice Center. (Dkt. No. 1 at 4.) On June 13, 2023, he filed a Section 1983 complaint form with an attachment

¹ Plaintiff filed a change of address on August 7, 2023. (Dkt. No. 9.)

² Plaintiff filed his complaint and motion to proceed IFP on June 13, 2023. (Dkt. Nos. 1, 2.) However, Plaintiff did not file the required inmate authorization form with his IFP application. By Order entered June 21, 2023, this case was administratively closed with an opportunity to comply with the filing fee requirement. (Dkt. No. 3.) Thereafter, Plaintiff filed his inmate authorization form required in this District, and the Clerk reopened the matter and restored it to the Court’s active docket. (Dkt. Nos. 7, 8.)

detailing his claims. *See id.* Plaintiff alleges when he appeared in front of the grand jury, he was forced to wear shackles despite requesting they be removed. *Id.* Plaintiff argues the district attorney did not articulate a reasonable basis for him being shackled in front of the grand jury and the lack of cautionary instructions to the grand jury caused prejudice against him. *Id.* at 5. In response, Plaintiff asked his attorney at the time, Heather Vincent, to move for his indictment to be dismissed due his “Fourteenth Amendment being violated.”³ *Id.*

He then alleges the prosecution “elicited a false testimony and allowed the testimony to stand uncorrected.” *Id.* at 7. He claims the witness, James Ramish, contradicted himself multiple times during his testimony proving he has “something to hide.” *Id.* Further, the “police statements and grand jury statements both are two different stories and almost seem coerced in the grand jury as if the witness was coached to say it.” *Id.* Plaintiff claims he has brought these issues up multiple times with different attorneys who “pushed [them] aside as if they don’t matter.” *Id.* Plaintiff asserts his due process rights were violated “because the outcome could have been more favorable to the defendant” if these issues were raised. *Id.*

Next, Plaintiff alleges Assistant District Attorney Louis Mannara (“ADA Mannara”) committed abuse of process. *Id.* at 6. Specifically, he claims ADA Mannara “gloated and boasted to [Plaintiff’s attorney] that he ‘spanked [Plaintiff’s] ass in the courtroom’” and “bragged” how he planned “to sentence [Plaintiff] to possibly the max sentence” on his case. *Id.* According to Plaintiff, this “proves” ADA Mannara had “an ulterior motive . . . as a district attorney.” *Id.*

³ Unless otherwise indicated, excerpts from the record are reproduced exactly as they appear in the original and errors in spelling, punctuation, and grammar have not been corrected.

Finally, Plaintiff claims Joseph Wetland, an attorney who never represented him, “exposed” his case to a third party, an inmate named Nathaniel Newton, by giving him pieces of Plaintiff’s discovery. *Id.* Newton proceeded to “show other inmates [Plaintiff’s] discovery that created a compremisal of [Plaintiff’s] defense” and “created a breach of attorney client communication under the professional rules of conduct.” *Id.* Additionally, Plaintiff alleges “the[] district attorney” has withheld his IDs, car titles, and bank cards for three years “creating hardships for [Plaintiff] almost making it a point to land [Plaintiff] back in jail.” *Id.*

Plaintiff lists his first cause of action as \$100,000 “for hardships created as a result of injustice including missed wages, loss of personal items, pain and suffering, mental abuse” and withholding of Plaintiff’s IDs, bank cards, and vehicle titles. *Id.* at 12. Plaintiff lists his second cause of action as “relief from incarceration due to violation” of Plaintiff’s Fifth and Fourteenth Amendments and “Constitutional Rights (Due Process).” He lists his third cause of action as “A T.R.O. from judge Matthew J. Doran and District Attorney Louis Mannara.” *Id.*

IV. STANDARD OF REVIEW

Under Section 1915(e), the Court must dismiss a complaint filed IFP if it determines that the action “(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint, or portion thereof, when the Court lacks subject matter jurisdiction. *See Fed. R. Civ. P. 12(h)(3)*. While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the “strongest arguments that they *suggest*.”

Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474-75 (2d Cir. 2006) (internal quotation marks and citation omitted).

A claim is frivolous when it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (holding that “a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible”); *Livingston*, 141 F.3d at 437 (“[A]n action is ‘frivolous’ when either: (1) the factual contentions are clearly baseless . . . or (2) the claim is based on an indisputably meritless legal theory.”).

To survive dismissal for failure to state a claim, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This short and plain statement of the claim must be “plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The statement of the claim must do more than present “an unadorned, the-defendant-harmed-me accusation.” *Id.* It must “give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (internal quotation marks and citations omitted); *see also* Fed. R. Civ. P. 8(a)(2).

In determining whether a complaint states a claim upon which relief may be granted, “the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff’s favor.” *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994). “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is

inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

Moreover, a court should not dismiss a *pro se* complaint “without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.” *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999) (citation and internal quotation marks omitted). However, an opportunity to amend is not required where “the problem with [the plaintiff’s] causes of action is substantive” such that “better pleading will not cure it.” *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

V. DISCUSSION

Plaintiff brings this action pursuant to 42 U.S.C. § 1983. (Dkt. No. 1.) To state a claim under Section 1983, a plaintiff must show that the challenged conduct was committed by a person acting under color of state law and that such conduct “deprived [him] of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010) (internal quotation marks and citation omitted). “Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere.” *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993).

To state a cognizable claim under Section 1983, a complaint must allege “(1) ‘that some person has deprived [the plaintiff] of a federal right,’ and (2) ‘that the person who has deprived [the plaintiff] of that right acted under color of state law.’” *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005) (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)) (alteration omitted).

A. *Heck v. Humphrey*

Plaintiff asserts claims for Fifth and Fourteenth Amendment due process violations, abuse of process, and violation of attorney client privilege. (Dkt. No. 1 at 5-7.) At this juncture,

however, the Court is unable to determine whether these claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). *Heck* provides when a claim under Section 1983 calls into question the validity of an underlying conviction, a district court must dismiss the claim, unless the conviction has been invalidated. 512 U.S. at 487. Although it is clear that Plaintiff is confined to Franklin Correctional Facility, he does not specify whether his current confinement is directly related to the underlying claim, nor whether it is related to the status of any relevant criminal proceeding. (Dkt. No. 1 at 4-7, 12; Dkt. No. 9.) If any criminal action relative to Plaintiff's allegations has since terminated, he must set forth that any convictions have been resolved in his favor in order to recover damages for due process violations. Because Plaintiff has not alleged sufficient facts in this regard, the Court cannot determine whether these claims may survive initial review. Thus, these claims should be dismissed without prejudice, allowing Plaintiff the opportunity to plead the status of any related underlying criminal proceeding.

B. Onondaga County

However, even if Plaintiff's claims were not barred by *Heck*, Plaintiff would need to establish municipal liability as laid out in *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978). In order to set forth a cognizable claim for municipal liability under Section 1983, a plaintiff must plead and prove that a deprivation of his constitutional rights was "caused by a governmental custom, policy, or usage of the municipality." *Jones v. Town of E. Haven*, 691 F.3d 72, 80 (2d Cir. 2012) (citing *Monell*, 436 U.S. 658); *see also Vippolis v. Vill. of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) ("The plaintiff must first prove the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries beyond merely employing the misbehaving officer."). A municipality may be liable for deprivation of constitutional rights under Section 1983 for policies or customs resulting in

inadequate training, supervision, or hiring when the failure to train, supervise, or hire amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-89 (1989). A plaintiff must also establish a causal connection—an affirmative link—between the policy and the deprivation of his constitutional rights. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion). Indeed, municipalities may only be held liable when the municipality itself deprives an individual of a constitutional right; it “may not be held liable on a theory of respondeat superior.” *Jeffes v. Barnes*, 208 F.3d 49, 56 (2d Cir. 2000).

Critically, “a prerequisite to municipal liability under *Monell* is an underlying constitutional violation by a state actor.” *Henry-Lee v. City of New York*, 746 F. Supp. 2d 546, 567 (S.D.N.Y. 2010). As the Second Circuit has noted, “*Monell* does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization’s failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation.” *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006); *see also Henry-Lee*, 746 F. Supp. 2d at 567 (noting once a “district court properly [finds] no underlying constitutional violation, its decision not to address the municipal defendants’ liability under *Monell* [is] entirely correct”) (citation omitted)).

Plaintiff has not asserted any of the alleged unconstitutional acts were attributable to a municipal policy or custom, but rather to certain individuals such as Heather Vincent, ADA Mannara, Judge Mather J. Doran, and Joseph Wetland.⁴ (Dkt. No. 1 at 4-7.) “Custom denotes

⁴ Plaintiff does not list any of these individuals in the caption of his complaint. A party not named in the caption of the complaint is not a party to the action. *Whitley v. Krinsler*, No. 06-CV-0575, 2007 WL 2375814, at *1 (W.D.N.Y. Aug. 15, 2007) (“If people are not also named in the caption of the [] complaint, they will not be defendants in the case.”). Moreover, to the extent Plaintiff will seek to sue any individual prosecutor, such as ADA Mannara, he or she

persistent and widespread practices, and thus proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*[.]” *Ahern v. City of Syracuse*, 411 F. Supp. 2d 132, 139 (N.D.N.Y. 2006) (internal quotation marks and citation omitted). As the Second Circuit has made clear, “isolated acts . . . by non-policymaking municipal employees are generally not sufficient to demonstrate a municipal custom, policy, or usage that would justify municipal liability.” *Jones*, 691 F.3d at 81 (citing *Villante v. Dep’t of Corr.*, 786 F.2d 516, 519 (2d Cir. 1986)); *see also Henderson v. Town of Greenwich*, 317 F. App’x 46, 47 (2d Cir. 2009) (“Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*.”) (quoting *City of Oklahoma City*, 471 U.S. at 823-24).

VI. CONCLUSION

For the reasons stated herein, it is hereby

ORDERED that Plaintiff’s IFP application (Dkt. No. 2) is **GRANTED**;⁵ and it is further

RECOMMENDED that Plaintiff’s complaint be **DISMISSED WITH LEAVE TO AMEND**; and it is further

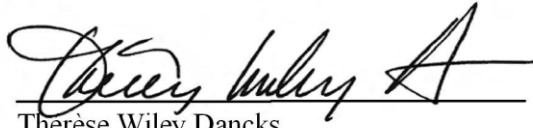
would likely be protected by prosecutorial immunity. *Simon v. City of New York*, 727 F.3d 167, 171 (2d Cir. 2013). Likewise, to the extent Plaintiff will seek to sue any individual judge, such as Judge Doran, he or she would likely be immune from suit for damages for any actions taken within the scope of their judicial responsibilities. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Finally, to the extent Plaintiff will seek to sue Heather Vincent and/or Joseph Wetland, “private individuals . . . cannot be sued under 42 U.S.C. § 1983 absent a plausible allegation that they acted under color of state law.” *Basile v. Connolly*, 538 F. App’x 5, 7 (2d Cir. 2013). Further, attorneys, whether court appointed or privately retained, are generally not state actors for purposes of Section 1983. *See, e.g., Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981).

⁵ Plaintiff should note that although his IFP application has been granted, he will still be required to pay fees that he may incur in this action, including copying and/or witness fees.

ORDERED that the Clerk provide Plaintiff with a copy of this Order and Report-Recommendation, along with copies of the unpublished decisions cited herein in accordance with *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.⁶ Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec’y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 72, 6(a).

Dated: September 5, 2023
Syracuse, New York


Therèse Wiley Dancks
United States Magistrate Judge

⁶ If you are proceeding *pro se* and are served with this Order and Report-Recommendation by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. 6(a)(1)(C).

2010 WL 5185047

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

David J. CASH, Plaintiff,

v.

BERNSTEIN, MD, Defendant.

No. 09 Civ.1922(BSJ)(HBP).

I

Oct. 26, 2010.

REPORT AND RECOMMENDATION¹

¹ At the time the action was originally filed, the Honorable Leonard B. Sand, United States District Judge, granted plaintiff's application for *in forma pauperis* status based on plaintiff's *ex parte* submission (Docket Item 1). Although the present application seeking to revoke plaintiff's *in forma pauperis* status is non-dispositive, I address it by way of a report and recommendation to eliminate any appearance of a conflict between the decision of a district judge and that of a magistrate judge.

PITMAN, United States Magistrate Judge.

*1 TO THE HONORABLE BARBARA S. JONES, United States District Judge,

I. Introduction

By notice of motion dated March 4, 2010 (Docket Item 11), defendant moves pursuant to 28 U.S.C. § 1915(g) to revoke plaintiff's *in forma pauperis* ("IFP") status on the ground that plaintiff has previously had at least three Section 1983 actions dismissed as frivolous, malicious or failing to state a claim upon which relief could be granted, and has not shown that he is in imminent danger of serious physical injury. Defendant further seeks an order directing that the action be dismissed unless plaintiff pays the full filing fee within thirty (30) days. For the reasons set forth below, I respectfully recommend that defendant's motion be granted.

II. Facts

Plaintiff, a sentenced inmate in the custody of the New York State Department of Correctional Services, commenced this action on or about January 12, 2009 by submitting his complaint to the Court's Pro Se office. Plaintiff alleges, in pertinent part, that he has "a non-healing ulcer that is gane green [*sic*]" and that defendant Bernstein "did not want to treat the ulcer right" (Complaint, dated March 3, 3009 (Docket Item 2) ("Compl."), at 3).

The action was originally commenced against two defendants—Dr. Bernstein and Dr. Finkelstein. The action was dismissed as to Dr. Finkelstein because the complaint contained no allegations whatsoever concerning Dr. Finkelstein (Order dated February 18, 2010 (Docket Item 9)).

On March 4, 2010, the sole remaining defendant—Dr. Bernstein—filed the current motion. Plaintiff failed to submit a response. Accordingly, on August 20, 2010, I issued an Order advising plaintiff that if he wished to oppose the motion, he must submit his opposition by September 15, 2010 and that after that date I would consider the motion fully submitted and ripe for decision (Order dated August 20, 2010 (Docket Item 15)). The only submission plaintiff has made in response to my Order is a multi-part form issued by the New York State Department of Correctional Services entitled "Disbursement or Refund Request."² By this form, plaintiff appears to request that the New York State Department of Correctional Services pay the filing fee for this action. The form is marked "Denied."

² Plaintiff sent this form directly to my chambers, and it has not been docketed by the Clerk of the Court. The form will be docketed at the time this Report and Recommendation is issued.

III. Analysis

28 U.S.C. § 1915 permits an indigent litigant to commence an action in a federal court without prepayment of the filing fee that would ordinarily be charged. Although an indigent, incarcerated individual need not prepay the filing fee at the time at the time of filing, he must subsequently pay the fee, to the extent he is able to do so, through periodic withdrawals from his inmate accounts. 28 U.S.C. § 1915(b); *Harris v. City of New York*, 607 F.3d 18, 21 (2d Cir.2010). To prevent abuse of the judicial system by inmates, paragraph (g) of this provision denies incarcerated individuals the right to proceed without prepayment of the filing fee if they have repeatedly filed meritless actions, unless such an individual shows that he or she is in imminent danger of serious

physical injury. See *Ortiz v. McBride*, 380 F.3d 649, 658 (2d Cir.2004) (“[T]he purpose of the PLRA ... was plainly to curtail what Congress perceived to be inmate abuses of the judicial process.”); *Nicholas v. Tucker*, 114 F.3d 17, 19 (2d Cir.1997). Specifically, paragraph (g) provides:

*2 In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

If an inmate plaintiff seeks to avoid prepayment of the filing fee by alleging imminent danger of serious physical injury, there must be a nexus between the serious physical injury asserted and the claims alleged. *Pettus v. Morgenthau*, 554 F.3d 293, 298 (2d Cir.2009).

Section 1915(g) clearly prevents plaintiff from proceeding in this action without prepayment of the filing fee. The memorandum submitted by defendant establishes that plaintiff has had his IFP status revoked on at least four prior occasions as a result of his repeatedly filing meritless actions.

- In 2005, plaintiff commenced an action in the United States District Court for the Northern District of New York seeking to have his infected leg amputated. *Nelson*³ v. *Lee*, No. 9:05–CV–1096 (NAM)(DEP), 2007 WL 4333776 (N.D.N.Y. Dec. 5, 2007). In that matter, the Honorable Norman A. Mordue, Chief United States District Judge, accepted and adopted the Report and Recommendation of the Honorable David E. Peebles, United States Magistrate Judge, that plaintiff had brought three or more prior actions that had been dismissed for failure to state a claim and that plaintiff's IFP status should, therefore, be revoked. 2007 WL 4333776 at *1–*2.

3

It appears that plaintiff uses the names David J. Cash and Dennis Nelson interchangeably. In his complaint in this matter, plaintiff states that the Departmental Identification Number, or DIN, assigned to him by the New York State Department of Correctional Services (“DOCS”) is 94–B–0694 (Compl. at 7). DOCS inmate account records submitted by plaintiff in connection with his application for IFP status indicate that DIN 94–B–0694 is assigned to Dennis Nelson. In addition, the DOCS form described in footnote two bears the docket number of this action, but is signed in the name of Dennis Nelson and was sent in an envelope identifying the sender as Dennis Nelson. A subsequent action has been filed in this Court in which the plaintiff identifies himself as Dennis Nelson but lists his DIN as 94–B–0694, the same DIN used by plaintiff here. Finally, plaintiff has submitted nothing to controvert the assertion in defendant's papers that David Cash and Dennis Nelson are the same person. In light of all these facts, I conclude that David Cash and Dennis Nelson are both names used by plaintiff.

- In *Nelson v. Nesmith*, No. 9:06–CV–1177 (TJM)(DEP), 2008 WL 3836387 (N.D.N.Y. Aug. 13, 2008), plaintiff again filed an action concerning the medical care he was receiving for his left leg. The Honorable Thomas J. McAvoy, United States District Judge, accepted the Report and Recommendation of Magistrate Judge Peebles, and revoked plaintiff's IFP status and dismissed the action on the ground that plaintiff had previously commenced at least three actions that had been dismissed on the merits. 2008 WL 3836387 at *1, *7.
- In *Nelson v. Spitzer*, No. 9:07–CV–1241 (TJM) (RFT), 2008 WL 268215 (N.D.N.Y. Jan. 29, 2008), Judge McAvoy again revoked plaintiff's IFP status on the ground that plaintiff had commenced three or more actions that constituted “strikes” under Section 1915(g) and had not shown an imminent threat of serious physical injury. 2008 WL 268215 at *1–*2.
- Finally, in *Nelson v. Chang*, No. 08–CV–1261 (KAM)(LB), 2009 WL 367576 (E.D.N.Y. Feb. 10, 2009), the Honorable Kiyo A. Matsumoto, United

States District Judge, also found, based on the cases discussed above, that plaintiff had exhausted the three strikes permitted by [Section 1915\(g\)](#) and could not proceed IFP in the absence of a demonstration of an imminent threat of serious physical injury. 2009 WL 367576 at *2–*3.

*3 As defendant candidly admits, there is one case in which plaintiff's leg infection was found to support a finding of an imminent threat of serious physical injury sufficient to come within the exception to [Section 1915\(g\)](#). *Nelson v. Scoggy*, No. 9:06–CV–1146 (NAM)(DRH), 2008 WL 4401874 at *2 (N.D.N.Y. Sept. 24, 2008). Nevertheless, summary judgment was subsequently granted for defendants in that case, and the complaint was dismissed. Judge Mordue concluded that there was no genuine issue of fact that plaintiff had received adequate medical care for his leg wound and that the failure of the leg to heal was the result of plaintiff's own acts of self-mutilation and interference with the treatment provided. *Nelson v. Scoggy*, No. 9:06–CV–1146 (NAM)(DRH), 2009 WL 5216955 at *3–*4 (N.D.N.Y. Dec. 30, 2009).⁴

⁴ Although the form complaint utilized by plaintiff expressly asks about prior actions involving the same facts, plaintiff disclosed only the *Scoggy* action and expressly denied the existence of any other actions relating to his imprisonment (Compl. at 6).

In light of the foregoing, there can be no reasonable dispute that plaintiff has exceeded the three “strikes” allowed by [Section 1915\(g\)](#) and that he cannot, therefore, proceed here without prepaying the filing fee unless he demonstrates an imminent threat of serious physical injury. Plaintiff has declined to attempt to make this showing in response to defendant's motion, and the only suggestion in the record of serious physical injury is the bare statement in the complaint that plaintiff “need[s] to go back to a wound speci[a]list before the gane green [*sic*] kills [him]” (Compl. at 5). “However, unsupported, vague, self-serving, conclusory speculation is not sufficient to show that Plaintiff is, in fact, in imminent danger of serious physical harm.” *Merriweather v. Reynolds*, 586 F.Supp.2d 548, 552 (D.S.C.2008), citing *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir.2003) and *White v. Colorado*, 157 F.3d 1226, 1231–32 (10th Cir.1998); see also *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir.2003) (imminent danger exception to [Section 1915\(g\)](#) requires “specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury”). Given the plaintiff's

history, as set forth in the cases described above, I conclude that this vague statement is insufficient to support a finding that plaintiff is in imminent danger of serious physical injury.⁵

⁵ Plaintiff has sent me several letters describing his wound and its symptoms in detail, and I have no doubt that the wound is serious. However, in granting summary judgment dismissing an action last year based on the same allegations, Judge Mordue of the Northern District found that there was no genuine issue of fact that plaintiff's own conduct was responsible for the ineffectiveness of the treatment he was provided:

Furthermore, to the extent that Nelson's medical treatment was delayed, much of the delay was due to his own refusal to cooperate with medical staff and his self-mutilations. Nelson's actions to thwart the medical treatment of his wound cannot be construed as interference or indifference by anyone else.... [T]he medical treatment Nelson received complied with constitutional guarantees as it was appropriate, timely, and delayed only by Nelson's own actions.

Nelson v. Scoggy, *supra*, 2009 WL 5216955 at *4.

Given plaintiff's total failure to respond to the pending motion and his failure to even deny that he is actively thwarting treatment of his wound, it would be sheer speculation for me to conclude that he is in imminent danger of a serious injury as a result of defendant's conduct.

IV. Conclusion

Accordingly, for all the foregoing reasons, I find that plaintiff has had three or more prior actions dismissed as being frivolous, malicious or failing to state a claim and that plaintiff's *in forma pauperis* status should, therefore, be revoked. If your Honor accepts this recommendation, I further recommend that the action be dismissed unless plaintiff pays the filing fee in full within thirty (30) days of your Honor's final resolution of this motion.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(C) and [Rule 72\(b\)](#) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also [Fed.R.Civ.P. 6\(a\)](#). Such objections (and

responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Barbara S. Jones, United States District Judge, 500 Pearl Street, Room 1920, and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Jones. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. *Thomas v. Arn*, 474 U.S. 140, 155

(1985); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir.1997); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir.1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir.1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 57–59 (2d Cir.1988); *McCarthy v. Manson*, 714 F.2d 234, 237–38 (2d Cir.1983).

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United States District Court,
W.D. New York.

Vidal WHITLEY, Plaintiff,

v.

Major KRINSER, Sgt. Robin Brown, Captain Winters,
Corporal Conklin, Deputy Johnson, Lt. Prinzi, Corporal
Carlo, Lt. Santillo, Sgt. Garcia, Major Kasacey,
Corporal Peck, and Deputy Galling, Defendants.

No. 06-CV-0575F.

|

Aug. 15, 2007.

Attorneys and Law Firms

Vidal Whitley, Willard, NY, pro se.

DECISION and ORDER

WILLIAM M. SKRETNY, United States District Judge.

INTRODUCTION

*1 By an Order dated February 8, 2007, plaintiff *pro se* Vidal Whitley was granted permission to file a second amended complaint in this action pursuant to 42 U.S.C. § 1983 to specifically address issues relating to defendants Kasacey, Krinser and Peck. For the reasons stated below, plaintiff's second amended complaint is dismissed and the amended complaint is allowed to go forward at this stage against all named defendants except as to defendants Krinser, Kasacey and Peck.

DISCUSSION

Section 1915(e) (2)(B) of 28 U.S.C. provides that the Court shall dismiss a case in which *in forma pauperis* status has been granted if, at any time, the Court determines that the action “(ii) fails to state a claim upon which relief may be granted.” Based on its evaluation of the complaint, the Court finds that plaintiffs claims against defendants Krinser, Kasacey and Peck must be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) because they fail to state a claim upon which relief

may be granted. Despite direction to specify what Krinser, Kasacey and Peck were responsible for, plaintiff's second amended complaint does not allege sufficient facts to state claims against Krinser, Kasacey and Peck.

In addition, plaintiff was directed that his second amended complaint “should name in the caption all of the people plaintiff wishes to hold responsible for each violation. Plaintiff has alleged that people who are not named in the caption were responsible for violation his rights. However, if these people are not also named in the caption of the second amended complaint, they will not be defendants in the case.” (Docket No. 11.) Because plaintiff has not named any additional defendants in the second amended complaint, has not included the allegations against the remaining defendants named in his amended complaint, and has failed to state a claim against Krinser, Kasacey and Peck, the second amended complaint is dismissed in its entirety. However, because of plaintiff's *pro se* status and his minimal literacy, the Court will deem the amended complaint the operative pleading in this case and allow it to proceed against all named defendants except Krinser, Kasacey and Peck.

CONCLUSION

For the reasons set forth above, plaintiffs claims against defendants Krinser, Kasacey and Peck are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and the amended complaint shall be served on the remaining defendants set forth in the caption above.

ORDER

IT HEREBY IS ORDERED, that the claims against Krinser, Kasacey and Peck are dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B); and,

FURTHER, the Clerk of the Court is directed to correct the docket to reflect that Sgt. Robin Brown, Captain Winters, Corporal Conklin, Deputy Johnson, Lt. Prinzi, Corporal Carlo, Lt. Santillo, Sgt. Garcia and Deputy Galling are defendants in this action; and,

FURTHER, the Clerk of the Court is directed to cause the U.S. Marshal to serve the amended complaint (Docket No. 10) and this Order upon the remaining defendants, Sgt. Robin Brown, Captain Winters, Corporal Conklin, Deputy Johnson, Lt.

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Prinzi, Corporal Carlo, Lt. Santillo, Sgt. Garcia and Deputy
Galling.

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***2** SO ORDERED.

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